



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 31, 1995

Ms. Samita Mehta
Senior Attorney
Legal Services Division
Texas Natural Resource Conservation
Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-173

Dear Ms. Mehta:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 31107.

The Texas Natural Resource Conservation Commission ("TNRCC") has received a request for information relating to the TNRCC contract with ENSR Corporation. Specifically, the requestor seeks "all files . . . that relate to the contract dispute between ENSR Corporation and the [TNRCC] arising out of work performed on the North Cavalcade Street Superfund Site in Houston, Texas; Contract No. 2800000014." You have submitted a representative sample of the requested information to us for review and claim that sections 552.101, 552.103, 552.107, and 552.111 of the Government Code except it from required public disclosure.¹ You also claim that one document, a calendar maintained by a project manager, is not a public record subject to the Open Records Act.

Section 552.103(a) excepts from required public disclosure information:

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 (1990) at 5; 511 (1988) at 3. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551 (1990), and when a requestor hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990).

You advise us that the TNRCC is involved in a contract dispute with ENSR Corporation regarding a number of ENSR's claims for payment on the North Cavalcade Street Superfund Site in Houston, Texas, and that ENSR Corporation has informed the TNRCC that it believes the TNRCC to be in breach of contract. You further advise us that ENSR Corporation has retained outside counsel to represent it in this matter. We conclude that litigation in this matter may be reasonably anticipated. Moreover, it appears that most of the submitted information relates to the anticipated litigation. The remainder of the submitted information, in particular the calendar entries that do not relate to the anticipated litigation, does not appear to be responsive to the request. We conclude, therefore, that the TNRCC may withhold most of the submitted information under section 552.103 of the Government Code and may withhold the remainder of the submitted information because it is not responsive to the request.

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the

information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/GCK/rho

Ref.: 31107

Enclosures: Submitted documents

cc: Ms. Amy L. Melvin
Legal Assistant
Kelly, Hart & Hallman
301 Congress Avenue, Suite 2000
Austin, Texas 78701
(w/o enclosures)

²You also claim that section 552.101 of the Government Code excepts some of the requested information from required public disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Without specifying which, if any, statutes make the requested information confidential, you claim that some of the submitted documents "may be confidential by law." We remind you that you are responsible for submitting in writing the reasons you believe the requested information is excepted from disclosure. Under the Open Records Act, all information held by governmental bodies is open to the public unless it is within a specific exception to disclosure. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by law. See Attorney General Opinion JM-672 (1987).